

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**M.M., Appellant**

**and**

**U.S. POSTAL SERVICE, DALLAS  
PERFORMANCE CLUSTER, Coppell, TX,  
Employer**

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**Docket No. 11-776  
Issued: March 1, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On January 31, 2011 appellant filed a timely appeal from the August 4, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for modification of an OWCP wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant met his burden of proof to establish that modification of OWCP's January 26, 1993 wage-earning capacity determination was warranted prior to April 3, 2008.

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<sup>1</sup> 20 C.F.R. § 8101 *et seq.* In a May 26, 2011 order, the Board dismissed appellant's appeal of the August 4, 2010 decision, finding that his appeal was untimely filed. In a January 11, 2012 order, the Board vacated its prior order and found that appellant's appeal was timely filed.

## **FACTUAL HISTORY**

On October 3, 1986 appellant, then a 41-year-old letter carrier filed an occupational disease claim alleging that he sustained a left hip condition due to his performance of repetitive job duties over time. OWCP accepted his claim for a permanent aggravation of degenerative arthritis of the left hip. In June 1987 appellant underwent left total hip replacement surgery which was authorized by OWCP. He received compensation for periods of disability.<sup>2</sup>

Appellant returned to modified-duty work as a general clerk for the employing establishment on June 4, 1988. The duties of the position were sitting from four to six hours a day, intermittent walking from one to two hours a day, incidental lifting limited to 20 pounds, standing from two to four hours a day, intermittent bending limited to one-half hour a day and no squatting, climbing, kneeling or twisting. Appellant's work limitations were based on the medical opinion of Dr. John F. Walker, an attending Board-certified orthopedic surgeon.<sup>3</sup>

In a January 26, 1993 decision, OWCP determined that appellant's actual earnings in his modified position as a general clerk represented his wage-earning capacity and resulted in zero percent wage loss. On March 2, 1993 it granted him a schedule award for a 62 percent permanent impairment of his left leg. In a December 12, 1995 decision,<sup>4</sup> the Board affirmed OWCP's wage-earning capacity determination. The Board also affirmed its determinations that appellant did not have a work-related right hip condition and that he was not entitled to additional schedule award compensation.

Appellant underwent total right hip replacement surgery on May 8, 2003. This surgery was not authorized by OWCP, as this condition was not accepted as being work related.

On April 3, 2008 appellant underwent a surgical revision of his left hip replacement which was performed by Dr. Brian S. Parsley, an attending Board-certified orthopedic surgeon. This procedure was authorized by OWCP.

On May 13, 2008 Dr. Parsley discussed appellant's progress since his April 3, 2008 left hip surgery. He discussed the reasons for appellant's April 3, 2008 surgery, noting that the progressive osteolysis and wear of his acetabular component was a process of mechanical wear.

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<sup>2</sup> Appellant stopped work on November 21, 1988 and on November 23, 1988 he filed an occupational disease claim alleging that he sustained a right hip condition due to his job duties. In April 6 and August 17, 1989 decisions, OWCP denied his claim on the grounds that he did not submit sufficient medical evidence to show that he sustained a work-related injury to his right hip. In a June 29, 1992 decision, the Board affirmed its determination regarding appellant's right hip, noting that the medical evidence did not establish that his right hip condition was causally related to either his work duties or to his accepted left hip condition.

<sup>3</sup> Appellant stopped working in this position on November 18, 1988 and was terminated from the employing establishment effective December 22, 1989.

<sup>4</sup> Docket No. 94-466 (issued December 12, 1995). This decision also noted that appellant's prior appeals regarding his right hip condition and his entitlement to a schedule award. Subsequent to the Board's December 12, 1995 decision, appellant appealed a December 18, 1996 OWCP's decision that denied his request for reconsideration. The Board affirmed this decision on March 26, 1999. Docket No. 97-1514 (issued March 26, 1999).

Dr. Parsley stated that anytime an artificial joint is performed the natural history of that joint is that it will wear in a similar nature to a set of automobile tires. These were mechanical devices that did not heal and repair themselves and therefore this process occurred over time. Dr. Parsley opined that appellant's current left hip condition was directly related to his initial left hip arthroplasty in 1987. He stated, "This is not a new unrelated problem but a direct relationship to that prior injury and prior surgery. In addition, this intervention is overdue and if performed at an earlier stage, the damage to the trochanteric bone might have been less severe."

A hip evaluation report dated November 4, 2008 indicated that appellant was able to walk without a cane one to three blocks, go up and down stairs, could sit in a chair one hour or greater, could enter public transportation and could perform outdoor activities of daily living. A June 16, 2009 hip evaluation report showed a somewhat lower level of reported physical activity.<sup>5</sup>

On November 18, 2009 appellant filed a Form CA-7 (claim for compensation) alleging entitlement to compensation for total disability from November 18, 1988 to November 18, 2009. The employing establishment indicated that he had been terminated from employment effective December 22, 1989. Appellant noted that his retirement annuity began on May 1, 1990.

In a December 8, 2009 letter, OWCP advised appellant that additional evidence was needed to support his compensation claim.

Appellant responded by letter dated January 8, 2010, asserting that he stopped work in November 1988 due to "changes in my left hip and pain in both hips." He claimed that he should have received wage-loss compensation for total disability since that time because his work stoppage was due to a work-related condition. Appellant referenced a December 1, 1988 report from Dr. John J. Walker, an attending Board-certified orthopedic surgeon, indicating that appellant was 100 percent totally and permanently disabled.<sup>6</sup> He stated that Dr. Christopher D. Burda, an attending Board-certified rheumatologist, indicated in a November 10, 1992 report that he had a loose prosthesis in his left hip. Dr. Burda also stated in a March 24, 1993 report that appellant's left hip surgery accelerated the disease in his right hip. Appellant noted that Dr. Gary P. Goodfried, an attending Board-certified orthopedic surgeon, indicated in an April 16, 2003 report that the hardware in his left hip replacement was worn and that he might require a surgical revision of the replacement. In a May 12, 2004 report, Dr. Goodfried discussed appellant's osteolytic changes and failing left hip arthroplasty.

In a November 10, 1992 report, Dr. Burda detailed his rating of appellant's permanent impairment. With respect to appellant's left hip, he noted, "? Loose Prosthesis." On March 24, 1993 Dr. Burda indicated that appellant's "30 percent disability" to his right hip was due to degenerative arthritis which was most probably present at the time of the onset of the arthritis in his left hip. He stated, "The subsequent surgery on the left hip accelerated the disease in the

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<sup>5</sup> These reports were not signed but it appears that they were completed by a physical therapist.

<sup>6</sup> In his December 1, 1988 report, Dr. Walker stated that appellant reported having pain in both hips and that his right hip had some narrowing of the medial wall with a little space remaining on the weight bearing surface. He noted, "I think [appellant] has come to the end of the point of time when he can be gainfully [sic]. I think he is 100 percent totally and permanently disabled. I do think that in the near future [appellant] will have to have a total hip arthroplasty on the right."

right hip. Clearly you have diminished movement of the right hip as a result of the degenerative joint disease accelerated and/or precipitated by your work activities and surgery.”

In an April 16, 2003 report, Dr. Goodfried noted that he told appellant that he had severe arthritis of his right hip and would have to consider a total right hip arthroplasty. He stated, “We specifically discussed his left hip and demonstrating the eccentric wear of the poly[ethylene] and the probable osteolysis seen in the proximal femur. I explained that soon he may be facing revision of the left total hip replacement.” In his May 12, 2004 report, Dr. Goodfried indicated that x-rays of appellant’s left hip revealed osteolytic changes in and about the proximal portion of the stem, some osteolytic changes noted around the acetabular component and wear of the polyethylene replacement hardware. He sought to treat appellant’s left hip conservatively as it was still not painful enough for him to proceed with any surgical intervention.

In a January 25, 2010 decision, OWCP denied appellant’s claim for compensation for November 18, 1988 to November 18, 2009 on the grounds he did not submit adequate rationalized medical evidence explaining why he was unable to continue to work with restrictions.

Appellant requested an oral hearing before an OWCP hearing representative. At a May 26, 2010 hearing, appellant expanded upon the arguments he made in his January 8, 2010 letter. He stated that he wanted to switch back to compensation under FECA, rather than continue on his retirement benefits. Appellant argued that the need for a surgical revision of his left hip replacement was directly related to his accepted work conditions. He indicated that he stopped work on November 18, 1988 and never returned to any type of work.

In an August 4, 2010 decision, OWCP’s hearing representative affirmed the January 25, 2010 decision in part and reversed it in part. She found that, for the period January 26, 1993 to April 2, 2008, appellant had not shown that the January 26, 1993 wage-earning capacity determination should be modified. Appellant had not submitted rationalized medical evidence showing that an injury-related condition prevented him from working during this period.<sup>7</sup> The hearing representative further found that he established that the January 26, 1993 wage-earning capacity determination should be modified beginning April 3, 2008, the date he underwent a revised left total hip replacement due to his work-related condition as supported by the well-rationalized May 13, 2008 report of Dr. Parsley. She remanded the case to OWCP for further development of the evidence, including an evaluation of how long the April 3, 2008 surgery would have rendered appellant disabled from all work.

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant’s ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>8</sup> OWCP’s procedure manual provides that, “[i]f a

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<sup>7</sup> OWCP’s hearing representative indicated that it had not been shown that appellant’s right hip condition was work related.

<sup>8</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless appellant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”<sup>9</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.<sup>10</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>11</sup>

In addition, Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) appellant’s medical condition has changed; or (3) he has been vocationally rehabilitated. OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that appellant has been vocationally rehabilitated.<sup>12</sup>

Section 8115(a) of FECA provides that the “wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.”<sup>13</sup> The Board has stated, “Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee’s wage-earning capacity, must be accepted as such measure.”<sup>14</sup> OWCP procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.<sup>15</sup> However, wage-earning capacity

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>10</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>11</sup> *Id.*

<sup>12</sup> See Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.814.11 (June 1996).

<sup>13</sup> 5 U.S.C. § 8115(a).

<sup>14</sup> *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as “the incapacity, because of an employment injury, to earn the wages the employee was receiving *at the time of injury*.” (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent an employee’s wage-earning capacity, OWCP applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee’s compensation.

<sup>15</sup> See Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.814.7c (December 1993).

may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.<sup>16</sup>

### ANALYSIS

OWCP based appellant's loss of wage-earning capacity on a determination that his actual earnings as a general clerk beginning June 4, 1988 represented his wage-earning capacity. This determination was consistent with section 8115(a) of FECA which provides that the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.<sup>17</sup> OWCP properly noted that appellant had received actual earnings as a general clerk for more than 60 days when it issued its January 26, 1993 decision and there is no evidence that his earnings in this position did not fairly and reasonably represent his wage-earning capacity.<sup>18</sup> The general clerk position was not an odd-lot or make-shift position designed for appellant's particular needs and it was not seasonal in nature.<sup>19</sup>

Appellant submitted medical evidence to establish that OWCP's January 26, 1993 wage-earning capacity determination was erroneous. In a December 1, 1988 report, Dr. Walker, an attending Board-certified orthopedic surgeon, indicated that appellant was 100 percent totally and permanently disabled. However, he did not provide any explanation for this conclusion and his report does not describe appellant's medical condition at or about OWCP's wage-earning capacity determination in early 1993. In a March 24, 1993 report, Dr. Burda, an attending Board-certified rheumatologist, posited that appellant's 1987 left hip surgery accelerated the disease in his right hip. He did not provide any explanation for this opinion or any discussion of appellant's ability to work at this time.<sup>20</sup>

The evidence establishes that appellant's actual earnings as a general clerk fairly and reasonably represented his wage-earning capacity and OWCP properly adjusted his compensation based on this wage-earning capacity determination.<sup>21</sup> For these reasons, appellant has not shown that OWCP's original determination with regard to his wage-earning capacity was erroneous.

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<sup>16</sup> See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.814.7a(1) (July 1997).

<sup>17</sup> See *supra* note 14.

<sup>18</sup> See *supra* note 15. Appellant worked as a general clerk from June 4 to November 17, 1988.

<sup>19</sup> See *supra* note 16.

<sup>20</sup> The Board further notes that it has not been accepted that appellant sustained a work-related right hip condition, either directly caused by work factors or as a consequence of his accepted left hip condition. The record does not contain rationalized medical evidence establishing such a condition.

<sup>21</sup> OWCP properly applied the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in appellant's compensation.

Appellant alleged that there was a material change in the nature and extent of his work-related condition and submitted medical evidence which he felt supported this claim.

The Board finds that OWCP properly determined that modification of the January 26, 1993 wage-earning capacity determination was warranted beginning April 3, 2008, the date appellant underwent a revised left total hip replacement due to his work-related condition. OWCP based this determination on the well-rationalized May 13, 2008 report of Dr. Parsley, an attending Board-certified orthopedic surgeon.<sup>22</sup>

The Board further finds that appellant did not submit sufficient medical evidence to establish a material change in his injury-related condition which would have prevented him from performing the general clerk position prior to April 3, 2008.<sup>23</sup>

In an April 16, 2003 report, Dr. Goodfried, an attending Board-certified orthopedic surgeon, discussed the wearing down of the hardware implanted during appellant's 1987 left hip surgery and described the effects of this process. He advised that appellant might need to undergo a revision of the 1987 left total hip replacement. In a May 12, 2004 report, Dr. Goodfried stated that he would like to treat appellant's left hip condition conservatively as this condition was still not painful enough for him to proceed with any surgical intervention. Although he indicated that there had been some change in appellant's left knee process, he did not provide any opinion on appellant's inability to work at this time. There is no evidence of record establishing that an injury-related condition prevented appellant from working as a general clerk prior to April 3, 2008.

For these reasons, appellant also has not shown that he sustained a material change in his injury-related condition prior to April 3, 2008 such that he was not able to perform the light-duty job which was used to determine his wage-earning capacity. He has not been retrained or otherwise vocationally rehabilitated such that his work as a general clerk would not be representative of his wage-earning capacity. Appellant did not show that modification of the January 26, 1993 wage-earning capacity determination was warranted prior to April 3, 2008.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that modification of OWCP's January 26, 1993 wage-earning capacity determination was warranted prior to April 3, 2008.

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<sup>22</sup> The case was properly remanded to OWCP for further development of the evidence, including an evaluation of how long the April 3, 2008 surgery would have continued to disable appellant from all work.

<sup>23</sup> See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989) (discussing the need for rationalized medical evidence to show a material change in an injury-related condition in the context of a request for modification of an OWCP wage-earning capacity determination).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 4, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board